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No. 94-1018

Supreme Court, U.S.
FILED
DEC 28 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

THOMAS A. MASS, pro se, and JANET A. MASS,

Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation, and FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

Respondents confess to some confusion as to the meaning of Petitioners' "Questions Presented." Respondents offer the following statement in an effort to clarify the issues, pursuant to this Court's Rule 24.2:

I. Can a city's approval of a private subdivision make it liable to a neighbor for damages for inverse condemnation?

A. Does the city's regulatory approval of a private subdivision transform the private project into a public project?

B. Does the city's imposition of a condition through its police powers transform the private project into a public project?

II. Does the approval of a private subdivision deprive neighboring property owners of property without due process?

A. Do property owners have a vested property right in the zoning regulations previously applied to neighboring property?

B. Do property owners have a vested property right in the amount of traffic using a public street to be used by a neighboring subdivision?

III. Does California's subdivision procedure, as applied in this case, deprive neighboring property owners of procedural due process?

QUESTIONS PRESENTED – Continued

A. Are neighboring property owners entitled to notice of a hearing at which any decision to be made is ministerial, when they had already received notice of the preceding discretionary hearing?

B. Must a city advise a resident of the statute of limitations for suing it?

IV. Has the Petition raised any other federal issue?

A. Is California's subdivision procedure a matter for federal regulation?

B. Are local nuisances subject to federal regulation?

C. Is there a federal interest at stake when a developer's attorney defends a city's approval of the developer's private project?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Provisions:

Fifth Amendment.

Federal Rules of Civil Procedure:

Rule 15.

California Statutes:

Civil Code: §3482.

Government Code: §818.4; §65090; §65091; §65907; §66411; §66418; §66426; §66451.3; §66452.1; §66452.2; §66456; §66457; §66458; §66462; §66464; §66466; §66474; §66474.1; §66499.37.

Vehicle Code: §21.

Because of the length of these provisions, the texts of those statutes not already provided by Petitioners are printed in a separate Appendix.

STATEMENT OF THE CASE

Judgment was entered after demurrer, so Respondents will take the following facts from the various complaints, assuming the validity of those facts for now. Respondents reserve their right to contest the allegations should this matter return for trial. Citations to Petitioners' Appendix will be in the form "P.A. [Volume #:

page]," with paragraph numbers where available. Citations to the Petition will be in the form "Pet. [page]."

Petitioners Thomas and Janet Mass live in Respondent City of Carlsbad (the "City"). (P.A. I: 1, ¶1) The south side of their property borders Corte de la Vista (P.A. I: 1, ¶2), a public street (P.A. I: 4, ¶14) that also borders a residential housing development (the "Project") being built by Respondent Fieldstone/La Costa Associates Limited Partnership ("Fieldstone") (P.A. I: 2, ¶5). When Fieldstone originally proposed the Project, it was to take access from Alicante Road (P.A. I: 2-3, ¶10), another nearby public street (P.A. I: 4, ¶14). However, the City conditioned approval of the Project on access coming from Corte de la Vista (P.A. I: 2-3, ¶10), the street shared with Petitioners. The City required this for public safety. (P.A. I: 3, ¶10)

Petitioners' home enjoys a panoramic view and pleasant breezes. (P.A. I: 2, ¶4; P.A. I: 4, ¶16) They paid a premium for this site (P.A. I: 7, ¶25(d)) based on their expectation that the Project would take access from Alicante Road, farther to the west (P.A. I: 4, ¶16; P.A. I: 10, ¶41-¶42). However, having the Project take access from Corte de la Vista will cause problems associated with traffic and new development, including intangibles such as noise and tangibles such as dust. (P.A. I: 4-5, ¶15-¶18) Petitioners believe that these problems constitute an uncompensated taking of their property. (P.A. I: 6, ¶24) Their first cause of action thus seeks a delay in development of the Project as well as compensation from the City for inverse condemnation. (P.A. I: 1; P.A. I: 9)

Construction of the Project began in August 1991 "with 'The City's' full authorization, direction and approval." (P.A. I: 10-11, ¶46) Construction noise, odors and dust allegedly constitute a nuisance. (P.A. I: 11, ¶46) In addition, the traffic and other problems associated with the completed Project, caused by the location of the Project's access, are expected to be permanent nuisances. (E.g., P.A. I: 12, ¶54) Petitioners' second cause of action seeks damages and other remedies against Fieldstone for nuisance. (P.A. I: 9; P.A. I: 16)

The City Council held a public hearing to decide whether to approve the tentative subdivision map. (P.A. I: 17-18, ¶82-¶87) Petitioners received notice of this hearing (P.A. I: 17, ¶81; P.A. I: 32), but allege that the notice was defective because it failed to inform them of the statute of limitations to challenge approval of the tentative map and that subsequent approval of a "final map" for the Project was ministerial. (P.A. I: 20, ¶91) Petitioner Thomas Mass appeared at the hearing and objected to relocating the Project's access. (P.A. I: 18, ¶84-¶85) Nevertheless, the Council approved the Project's tentative subdivision map on January 8, 1991. (P.A. I: 19, ¶87) The Council approved the final subdivision map on September 3, 1991, without further notice to Petitioners. (P.A. I: 19, ¶87) The third cause of action seeks to overturn the various approvals of the Project. (P.A. I: 17; P.A. I: 25-26)

Petitioners also tried to inject a civil rights claim into the case. Their proposed fifth (amended and supplemental) complaint alleged that the design, approval, and development of Fieldstone's Project violated their civil rights. (E.g., P.A. I: 66, ¶83-¶84, P.A. I: 87, ¶180)

Respondents demurred to each cause of action and moved to strike parts of each complaint; when leave to amend was granted, Petitioners amended their complaint and Respondents demurred again. (P.A. II: 18, 20, 22, 24) The trial court eventually sustained a demurrer without leave to amend. (P.A. II: 29) Petitioners sought leave to file another (the amended and supplemental) complaint and to vacate the order sustaining the last demurrer. (P.A. II: 27, 28) However, the trial court refused to vacate its earlier rulings and denied leave. (P.A. II: 31)

On Petitioners' appeal, the California Court of Appeal, Fourth District, Division One, affirmed most of the trial court's rulings, reversing only the ruling that Petitioners had not stated a cause of action for temporary nuisance arising from construction dust. (P.A. II: 35-36, ¶22-¶25; Pet. 21-35) The Court of Appeal denied Appellants' petition for rehearing. (P.A. II: 36, ¶28; Pet. 36) The California Supreme Court then denied Petitioners' petition for review. (P.A. II: 37, ¶35; P.A. II: 38; Pet. 37)

SUMMARY OF ARGUMENT

Certiorari is inappropriate for three general reasons. First, Petitioners' arguments are contrary to the laws of a consensus among the States, Federal Circuit Courts, and, when it has reached these issues, this Court as well. Second, Petitioners' arguments are contrary to common sense. Finally, many of Petitioners' arguments do not even implicate federal issues.

I. A city's approval of a private subdivision does *not* make it liable for damages for inverse condemnation.

Inverse condemnation only applies to takings resulting from private projects. A city's regulatory approval of a private project, proceeding through the police power, does *not* transform the private project or any portion thereof into a public one.

II. The City's approval of a private subdivision did *not* deprive neighboring property owners of their civil rights. The neighboring property owners have *no* vested property right in either the zoning regulations previously applied to someone else's property or in the amount of traffic on a public street.

III. California's subdivision procedures did *not* deprive Petitioners of due process. The City gave proper notice of its discretionary hearing. Notice of a subsequent ministerial hearing is *not* required. A city need *not* advise a resident of the statute of limitations for suing it.

IV. Petitioners' other issues (e.g., California's subdivision procedure and vehicle regulations) do *not* raise federal questions.

ARGUMENT

I

A CITY'S APPROVAL OF A PRIVATE SUBDIVISION DOES NOT MAKE THE CITY LIABLE TO THE PROJECT'S NEIGHBORS FOR TAKING THE NEIGHBORS' PROPERTY.

Petitioners' most important claim in this case is probably that the City, by approving development of the

Project, "took" their property. They demand compensation for the taking under the Fifth Amendment to the U.S. Constitution and a similar provision of the California Constitution. These provisions prohibit the taking of property for public use without payment of just compensation.

Stating the legal principle explains why Petitioners cannot state a cause of action: An agency's approval of a private development is not a public use. It is simply regulation of a private use, a rule upon which there is consensus. *E.g., Ullery v. County of Contra Costa,* 202 Cal.App.3d 562, 570, 248 Cal.Rptr. 727, 731-732 (1988); *Pepper v. J.J. Welcome Construction Co.,* 73 Wash.App. 523, 530-531, 871 P.2d 601, 606 (1994). Cases finding physical "takings" involved true public projects, such as freeways or a drainage facility. *E.g., Harding v. State of California,* 159 Cal.App.3d 359, 205 Cal.Rptr. 561 (1984); *Wilson v. Ramacher,* 352 N.W.2d 389, 394 (Minn. 1984).

Nor may Petitioners state a claim for a regulatory taking, even if the Project were public. Regulatory "taking" cases involve challenges to conditions imposed on development of one's own property. *E.g., Dolan v. City of Tigard,* ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Regulatory taking cases also presuppose regulation not supported by a legitimate state interest or that "denies an owner economically viable use of his land." *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980). Diminution in property value by itself does not constitute a taking. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 131, 98 S.Ct. 2646, 2662-2663, 57 L.Ed.2d 631, 652-653 (1978). However, Petitioners alleged that the Project was redesigned for safety

(P.A. I: 3, ¶10), and they still reside in the supposedly "taken" property (P.A. I: 1, ¶1). The agency is also typically immune under tort theories, as well. *E.g., California Government Code* §818.4; *Cootey v. Sun Investment, Inc.*, 68 Haw. 480, 485-486, 718 P.2d 1086, 1091 (1986).

Petitioners argue that the City, by ordering the relocation of access to the Project, transformed the Project, or at least its access, into a public project which physically invades their property. Petitioners' argument has no support in case law; what may be more important is that it has no support in common sense. Will Fieldstone be allowed to sue the City for approving the tract in which Petitioners live? After all, Petitioners cast dust and impose noise upon Fieldstone's land each time they work in their yard or drive their car. Will Petitioners sue the City each time a car passes by on Corte de la Vista? After all, the car generates the same pollution that led to this action, and the City accepted the street into its public system.

Petitioners' rule would also be contrary to the needs of the public. As this Court knows, development (and, generally, much economic activity) is subject to detailed regulation. If regulation of a private development turns any aspect of it into a public project, then liability could be imposed on public agencies for virtually every exercise of their police powers. Cities could be held liable by neighbors for approving a development at a greater intensity than the neighbors had expected, or, as here, with a different configuration than the neighbors had expected. This is neither expected nor reasonable. Because case law has already rejected Petitioners' claims, involvement by this Court is unnecessary.

II

THE CITY'S APPROVAL OF THE PRIVATE PROJECT DID NOT DEPRIVE NEIGHBORING PROPERTY OWNERS OF THEIR CIVIL RIGHTS.

Petitioners claim they were deprived of federal civil rights. Such claims require the loss of a cognizable property interest, which typically arise from state law. *E.g., Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972). However, case law holds that neighbors (Petitioners) lack any right in zoning for other person's (Fieldstone's) property; indeed, no one has a right even in the zoning of one's own property. *E.g., Wheeler v. Gregg*, 90 Cal.App.2d 348, 365, 367, 203 P.2d 37, 48, 49 (1949); *Love v. Navarro*, 262 F.Supp. 520 (C.D.Cal. 1967); *Agins, supra*, 447 U.S. at 260-262, 100 S.Ct. at 2141-2143, 65 L.Ed.2d at 111-113 (mere enactment of zoning does not usually result in taking; must submit development plan); *Muckway v. Craft*, 789 F.2d 517 (7th Cir. 1986) (failure of agency to enforce zoning ordinance against neighboring property does not support Constitutional claim). As this Court observed long ago about the police power:

> A vested interest cannot be asserted against it because of conditions once obtaining. [Citation omitted.] To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress. . . . The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus. *Hadacheck*

v. Los Angeles, 239 U.S. 394, 410, 36 S.Ct. 143, 145, 60 L.Ed. 348, 356 (1915).

Petitioners claim to have suffered a "traffic servitude" over Corte de la Vista. (Pet. 4) Besides being a matter of state law, this claim is invalid. Both Corte de la Vista and Alicante Road are public roads. (P.A. I: 4, ¶14) No one can own a private right in a public road; more specifically, there is a consensus that, other than a significant impairment of access, private persons have no actionable interest in the volume of use of a public road. *E.g., Filkins v. State*, 311 N.Y.S.2d 154, 63 N.Y.Misc.2d 380 (1970) (no right to prevent road construction which would increase traffic); *Troiano v. Colorado Department of Highways*, 170 Col. 484, 495-497, 463 P.2d 448, 453-454 (1970) (harm to business from reduction in traffic); *Division of Administration v. Capital Plaza, Inc.*, 397 So.2d 682, 683 (Fla. 1981) (same); *City of Memphis v. Hood*, 208 Tenn. 319, 323-327, 345 S.W.2d 887, 889-890 (1961) (same). It was the access to Fieldstone's Project that was moved, and that access was "moved" only on a planning map; it had not yet been built when it was "moved." (P.A. I: 2-3, ¶10) Petitioners suffered no harm.

Petitioners have made it clear that it is the location of access to Fieldstone's Project that is the gravamen of their complaint. (E.g., P.A. I: 6, ¶24; P.A. I: 15-16, ¶75-¶76; Pet. 3 ["had no objection to the proposed subdivision"]) They have no cognizable interest in the zoning or design of Fieldstone's Project. Petitioners' entire case rests on a "right" they do not have.

III

CALIFORNIA'S SUBDIVISION PROCEDURES HAVE NOT DEPRIVED PETITIONERS OF DUE PROCESS.

California requires that litigation challenging agency decisions on private development projects be filed within ninety days of the decision. *California Government Code* §65907 (use permits), §66499.37 (subdivisions). Petitioners missed this deadline, so they alleged other theories, such as inverse condemnation. However, these other claims all arise from the City's approval of the Project with its access configured a certain way Petitioners find offensive.

Petitioners then argue that the statute of limitations is unconstitutionally short. This argument is incorrect. Limitations periods need only be "reasonable" to be constitutional, *e.g., Kupka v. Board of Administration*, 122 Cal.App.3d 791, 797, 176 Cal.Rptr. 214, 218 (1981); *Bunker v. National Gypsum Co.*, 441 N.E.2d 8, 12 (Ind. 1982), appeal dismissed 460 U.S. 1076, 103 S.Ct. 1761, 76 L.Ed.2d 338, or "not be so manifestly inequitable as to amount to a denial of justice," *Ocean Shore Railroad Co. v. City of Santa Cruz*, 198 Cal.App.2d 267, 273, 17 Cal.Rptr. 892, 895 (1961).

There is a sound basis for the 90-day limitations period at issue here. As California courts have noted (typically in turning back challenges by developers), a short statute of limitations to challenge decisions on development projects helps reduce housing costs and avoid the construction of improvements inconsistent with other uses of the land. *E.g., Griffis v. County of Mono*, 163 Cal.App.3d 414, 422, 209 Cal.Rptr. 519, 524 (1985). Other

states allow even shorter periods when there is sufficient reason. *E.g., State ex rel. Labedz v. Beermann*, 229 Neb. 657, 667, 428 N.W.2d 608, 615 (1988) (upholding 10-day period to challenge refusal to file initiative petition). California's interests in the 90-day limitations period make the period eminently reasonable and thus constitutional.

Petitioners claim that the City should have given them notice of the limitations period. Due process does not generally require notice of the running of a limitations period. *Texaco, Inc. v. Short*, 454 U.S. 516, 535-536, 102 S.Ct. 781, 795-796, 70 L.Ed.2d 738, 755 (1982). Indeed, Petitioners' notion that notice was required arises from their fanciful belief that the City had something like a fiduciary obligation to advise Petitioners how best to sue it. (P.A. I: 76-77, ¶130-¶133)

Petitioners cite *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), as support. However, *Tulsa Professional* concerned a so-called "nonclaim" provision of judicial probate proceedings, where "the legal proceedings themselves trigger the time bar." *Tulsa Professional, supra*, 485 U.S. at 487, 108 S.Ct. at 1346, 99 L.Ed.2d at 577. The statutes here are deadlines to *file* judicial action and are thus true statutes of limitations. The *Tulsa Professional* opinion itself explained that due process was not implicated where "the State's involvement [is] in the mere running of a general statute of limitations." *Tulsa Professional, supra*, 485 U.S. at 485-486, 108 S.Ct. at 1345, 99 L.Ed.2d at 575. *Tulsa Professional* is inapplicable.

Petitioners claim they were deprived of a "pre-deprivation" proceeding. (Pet. 12) This is simply not true. One

purpose of a City Council hearing on the development project, as shown by the requirement of public notice, is to provide such a hearing. *Horn v. County of Ventura*, 24 Cal.3d 605, 612-619, 156 Cal.Rptr. 718, 721-726, 596 P.2d 1134, 1137-1142 (1979). Petitioners have alleged that the hearing was held. They appeared at the City Council hearing and opposed relocation of access to the Project. (P.A. I: 18, ¶84) Making the City's hearing on a development project meet the same standards as a judicial hearing would be inappropriate. The two are inherently different.

Petitioners claim that the statute requiring notice to neighbors of the hearing on the tentative map was "repealed." (Pet. 4) In fact, the requirement of notice of the hearing on the tentative map was merely moved into different statutes. *California Government Code* §66451.3, §65090, §65091. Petitioners' argument on this issue is rather odd, as Petitioner Thomas Mass did appear at the City's hearings.

IV

PETITIONERS' OTHER CLAIMS DO NOT IMPLICATE FEDERAL ISSUES.

Many of Petitioners' claims are based on their confusion about California's procedures governing review of development projects. None of these procedures implicate federal issues.

Under California law, a developer wishing to subdivide property into five or more new lots must first obtain approval for a "tentative map." *California Government*

Code §66426. Approval is a discretionary decision by the agency, and the agency may approve the tentative subdivision map subject to conditions. *California Government Code* §66452.1, §66452.2, §66474. Once the developer has complied with the conditions of the tentative map, such as constructing or securing the cost of constructing roads, it may submit a "final map." *California Government Code* §66456, §66457, §66462. Agency approval of the final map is mandatory if it is consistent with the tentative map. *California Government Code* §66458, §66474.1. Approval of the final map allows recordation of the new lots. *California Government Code* §66464, §66466(c). The Project involved a subdivision and thus obtained a tentative subdivision map (P.A. I: 2, ¶5, ¶9) as well as two types of use permits (P.A. I: 2, ¶8).

Consistent with California law, the City approved the Project's tentative map (and, although not clear in the complaints, use permits) first. (P.A. I: 2, ¶9) This first decision, on January 8, 1991, was *the* important discretionary decision on the Project. Petitioners had ninety days thereafter to challenge the Project, but did not file suit until October 18, 1991 (P.A. II: 18), after the City had approved the Project's final map on September 3, 1991 (P.A. I: 2, ¶9).

Petitioners have tried valiantly to turn these procedures into a federal case, but they failed. Petitioners argued that the City's approval of the final map was discretionary. However, California law, which established the subdivision process, defines approval of the final map as ministerial so long as it conforms to the previously approved tentative map. *California Government Code* §66474.1; *Youngblood v. Board of Supervisors*, 22 Cal.3d 644,

653-657, 150 Cal.Rptr. 242, 247-249, 586 P.2d 556, 561-563 (1978). The discretionary decision whether to allow the creation of the new lots is done at the tentative map stage.

Petitioners have claimed that the term "tentative" map is so misleading that the City's failure to explain its legal effect was a form of fraudulent concealment. (P.A. I: 76, ¶128) However, "tentative map" is a defined term of art from a statute, which case law has long interpreted as the crucial discretionary decision. Petitioners' familiarity with the statutory scheme is their own responsibility.

Petitioners claim they were denied due process because they were not notified of the City Council's consideration of the final map. However, because approval of a final map is mandatory and objective, it does not merit notice to neighbors. California has defined its own subdivision procedure such that approval of a final map is ministerial and based on objective criteria. Petitioners' claim that approval of a final map is discretionary is not a federal issue; it is one of local procedure (on which Petitioners are wrong).

Petitioners claim that approval of the Project violated both a statute reserving to the State authority over traffic regulations and the City's General Plan. (Pet. 12) These claims relate only to compliance with State law and thus raise no federal issue. Neither claim is true. The first claim, for example, misreads the State preemption statute (*California Vehicle Code* §21); California expressly delegated to local agencies the power to regulate the design of subdivisions, including the design of its streets. *California Government Code* §66411, §66418.

Petitioners had alluded to civil rights previously (e.g., P.A. I: 55, ¶75), but failed to state an explicit cause of action for deprivation until their amended and supplemental complaint (P.A. I: 65). However, this complaint was filed without leave of court, as required. (Pet. 34) American judicial systems typically require leave of court to file an amended complaint once a responsive pleading has been served. *E.g., In re Marriage of Peoples*, 96 Ill.App.3d 94, 96, 420 N.E.2d 1072, 1074 (1981); *F.R.Civ.P.* Rule 15(a). The complaints were based on essentially the same facts. Since there was no basis for liability and Petitioners had already had ample opportunities to amend, there was no reason to allow yet another complaint to be filed. *E.g., Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1137, 228 Cal.Rptr. 750, 753 (1986).

Petitioners argue that the same attorneys cannot represent both Respondents. (Pet. 6) This is incorrect. Fieldstone and the City have an "identical" interest in defeating Petitioners' claims. *Topanga Association for a Scenic Community v. County of Los Angeles*, 214 Cal.App.3d 1348, 1364, 263 Cal.Rptr. 214, 223 (1989). Moreover, Petitioners never alleged how this joint representation harmed them or became a federal issue.

Petitioners contend that the Project and its access will be a nuisance. However, nuisance is a matter of state, not federal, law. Although theoretically possible, this case does not present a nuisance reaching across a State line. For this Court to decide what constitutes a nuisance would unnecessarily entangle it in a topic not requiring national uniformity.

In any event, Petitioners also alleged that this development is taking place with the City's "full authorization, direction and approval," pursuant to permits authorized by local ordinances. (P.A. I: 10-11, ¶46) "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." *California Civil Code* §3482. This protection extends to private projects undertaken pursuant to permits. *Wheeler, supra,* 90 Cal.App.2d at 370, 203 P.2d at 51. Petitioners argue (Pet. 7) that this statute cannot protect a private entity. Their argument would mean that developers could be required by a city, acting under its police powers, to build a project in a certain way – and then be held liable for having done what they were ordered to do. *This* would raise a due process issue, but fortunately it is not the law.

The Petition argues that the immunity from nuisance liability is "a void defense against a claim for 'just compensation' under the constitution." (Pet. 7) Petitioners have confused two separate doctrines. A taking without compensation is of constitutional magnitude; a nuisance is not. The law bars the taking (inverse condemnation) claim for other reasons; that an immunity bars a nuisance claim raises no federal issue.

This action does raise questions relating to how far neighbors can be allowed to go to hinder approved development projects. However, those issues are hardly unsettled, and there is no need for this Court to become involved.

CONCLUSION

There is no reason to grant review. Case law in this area is settled, uniform, logical, and against Petitioners. Respondents respectfully request that this Court deny certiorari.

DATED: December 28, 1994

Respectfully submitted,

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No. 94-1018

In The

Supreme Court of the United States

October Term, 1994

THOMAS A. MASS, pro se, and JANET A. MASS,

Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation, and FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District, Division One

RESPONDENTS' APPENDIX

(Statutes)

U.S. Constitutional Provisions:

Fifth Amendment:

The text of this provision appears in Petitioners' Appendix, Volume II, page 1.

Federal Rules of Civil Procedure:

Rule 15: Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after

judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An Amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper

party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United State Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

California Statutes:

Civil Code §3482:

The text of this provision appears in Petitioners' Appendix, Volume II, page 12.

Government Code §818.4: Issuance, denial, suspension or revocation of permit, license, etc.

A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Government Code §65090: Public notice for plans

(a) When a provision of this title requires notice of a public hearing to be given pursuant to this section, notice shall be published pursuant to Section 6061 in at least one newspaper of general circulation within the jurisdiction of the local agency which is conducting the proceeding at least 10 days prior to the hearing, or if there is no such newspaper of general circulation, the notice shall be posted at least 10 days prior to the hearing in at least three public places within the jurisdiction of the local agency.

(b) The notice shall include the information specified in Section 65094.

(c) In addition to the notice required by this section, a local agency may give notice of the hearing in any other manner it deems necessary or desirable.

Government Code §65091:

The text of this provision appears in Petitioners' Appendix, Volume II, page 6.

Government Code §65907: Limitation of actions attacking certain decisions; application of section to charter cities

(a) Except as otherwise provided by ordinance, any action or proceeding to attack, review, set aside, void, or annul any decision of matters listed in Sections 65901 and 65903, or concerning any of the proceedings, acts, or determinations taken, done, or made prior to such decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, shall not be maintained by any person unless the action or proceeding is commenced within 90 days and the legislative body is served within 120 days after the date of the decision. Thereafter, all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of that decision or of these proceedings, acts, or determinations. All actions brought pursuant to this section shall be given preference over all other civil matters before the court, except probate, eminent domain, and forcible entry and unlawful detainer proceedings.

(b) Notwithstanding Section 65803, this section shall apply to charter cities.

(c) The amendments to subdivision (a) shall apply to decisions made pursuant to this division on or after January 1, 1984.

Government Code §66411: Local control of common interest developments and subdivision design and improvement; short term leases

Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency shall, by ordinance, regulate and control the initial design and improvement of common interest developments as defined in Section 1351 of the Civil Code and subdivisions for which this division requires a tentative and final or parcel map. In the development, adoption, revision, and application of such ordinance, the local agency shall comply with the provisions of Section 65913.2. The ordinance shall specifically provide for proper grading and erosion control, including the prevention of sedimentation or damage to offsite property. Each local agency may by ordinance regulate and control other subdivisions, provided that the regulations are not more restrictive than the regulations for those subdivisions for which a tentative and final or parcel map are required by this division, and provided further that the regulations shall not be applied to short-term leases (terminable by either party on not more than 30 days' notice in writing) of a portion of the operating right-of-way of a railroad corporation as defined by Section 230 of the Public Utilities Code unless a showing is made in individual cases, under substantial evidence, that public policy necessitates the application of the regulations to those short-term leases in individual cases.

Government Code §66418: Design

"Design" means: (1) street alignments, grades and widths; (2) drainage and sanitary facilities and utilities, including alignments and grades thereof; (3) location and size of all required easements and rights-of-way; (4) fire roads and firebreaks; (5) lot size and configuration; (6) traffic access; (7) grading; (8) land to be dedicated for park or recreational purposes; and (9) such other specific physical requirements in the plan and configuration of the entire subdivision as may be necessary to ensure consistency with, or implementation of, the general plan or any applicable specific plan.

Government Code §66426: Necessity of tentative and final maps

A tentative and final map shall be required for all subdivisions creating five or more parcels, five or more condominiums as defined in Section 783 of the Civil Code, a community apartment project containing five or more parcels, or for the conversion of a dwelling to a stock cooperative containing five or more dwelling units, except where:

(a) The land before division contains less than five acres, each parcel created by the division abuts upon a maintained public street or highway and no dedications or improvements are required by the legislative body, or

(b) Each parcel created by the division has a gross area of 20 acres or more and has an approved access to a maintained public street or highway, or

(c) The land consists of a parcel or parcels of land having approved access to a public street or highway which comprises part of a tract of land zoned for industrial or commercial development, and which has the approval of the governing body as to street alignments and widths, or

(d) Each parcel created by the division has a gross area of not less than 40 acres or is not less than a quarter of a quarter section.

A parcel map shall be required for those subdivisions described in subdivisions (a), (b), (c), and (d).

Government Code §66451.3: Notice of hearing; expenses

(a) Unless otherwise provided by this division, notice of a hearing held pursuant to this division shall be given pursuant to Sections 65090 and 65091.

(b) If the proposed subdivision is a conversion of residential real property to a condominium project, community apartment project, or stock cooperative project, the notice shall also be given by the local agency by United States mail to each tenant of the subject property, and shall also include notification of the tenant's right to appear and be heard. The requirements of this subdivision may be satisfied by service of the notice in compliance with the requirements for service of legal process by mail.

(c) Pursuant to Section 66451.2, fees may be collected from the subdivider for expenses incurred under this section.

(d) Any interested person may appear at the hearing and shall be heard.

Government Code §66452.1: Time for action by advisory agency

(a) If the advisory agency is not authorized by local ordinance to approve, conditionally approve or disapprove the tentative map, it shall make its written report on the tentative map to the legislative body within 50 days after the filing thereof with its clerk.

(b) If the advisory agency is authorized by local ordinance to approve, conditionally approve, or disapprove the tentative map, it shall take that action within 50 days after the filing thereof with its clerk and report its action to the subdivider.

(c) The local agency shall comply with the time periods referred to in Section 21151.5 of the Public Resources Code. The time periods specified in subdivisions (a) and (b) shall commence after certification of the environmental impact report, adoption of a negative declaration, or a determination by the local agency that the project is exempt from the requirements of Division 13 (commencing with Section 21000) of the Public Resources Code.

Government Code §66452.2: Consideration of map by legislative body; time

(a) If there is an advisory agency which is not authorized by local ordinance to approve, conditionally approve or disapprove the tentative map, at the next regular meeting of the

legislative body, following the filing of the advisory agency's report with it, the legislative body shall fix the meeting date at which the tentative map will be considered by it, which date shall be within 30 days thereafter and the legislative body shall approve, conditionally approve, or disapprove the tentative map within that 30-day period.

(b) If there is no advisory agency, the clerk of the legislative body shall submit the tentative map to the legislative body at its next regular meeting which shall approve, conditionally approve or disapprove that map within 50 days thereafter.

(c) The local agency shall comply with the time periods referred to in Section 21151.5 of the Public Resources Code. The time periods specified in subdivisions (a) and (b) shall commence after certification of the environmental impact report, adoption of a negative declaration, or a determination by the local agency that the project is exempt from the requirements of Division 13 (commencing with Section 21000) of the Public Resources Code.

Government Code §66456: Survey; preparation of final map

After the approval or conditional approval of the tentative map and prior to the expiration of such map, the subdivider may cause the real property included within the map, or any part thereof, to be surveyed and a final map thereof prepared in accordance with the approved or conditionally approved tentative map.

Government Code §66457: Filing for approval

(a) A final map or parcel map conforming to the approved or conditionally approved tentative map, if any, may be filed with the legislative body for approval after all required certificates or statements on the map have been signed and, where necessary, acknowledged.

(b) If the subdivision lies entirely within the territory of a city, the map shall be filed with the city. If the subdivision lies entirely within unincorporated territory, the map shall be filed with the county. If the subdivision lies partially within two or more territories, the map shall be filed with each, and each shall act thereon as provided in this chapter.

Government Code §66458:

The text of this provision appears in Petitioners' Appendix, Volume II, page 8.

Government Code §66462: Agreements relating to improvements not completed

(a) If, at the time of approval of the final map by the legislative body, any public improvements required by the local agency pursuant to this division or local ordinance have not been completed and accepted in accordance with standards established by the local agency by ordinance applicable at the time of the approval or conditional approval of the tentative map, the legislative body, as a condition precedent to the approval of the final map, shall require the subdivider to enter into one of the

following agreements specified by the local agency:

(1) An agreement with the local agency upon mutually agreeable terms to thereafter complete the improvements at the subdivider's expense.

(2) An agreement with the local agency to thereafter do either of the following:

(A) Initiate and consummate proceedings under an appropriate special assessment act or the Mello-Roos Community Facilities Act of 1982, Chapter 2.5 (commencing with Section 53311) of Part 1 of Division 2 of Title 5 for the financing and completion of all of the improvements.

(B) If the improvements are not completed under a special assessment act or the Mello-Roos Community Facilities Act of 1982, Chapter 2.5 (commencing with Section 53311) of Part 1 of the Division 2 of Title 5, to complete the improvements at the subdivider's expense.

(b) The standards may be adopted by reference, without posting or publishing them, if they have been printed in book or booklet form and three copies of the books or booklets have been filed for use and examination by the public in the office of the clerk of the legislative body.

(c) The local agency entering into any agreement pursuant to this section shall require that performance of the agreement be guaranteed by the security specified in Chapter 5 (commencing with Section 66499).

Government Code §66464: Transmittal of maps; certification or statement concerning certificates, statements and deposits

(a) Unless otherwise provided by the county, if the final map or map parcel is not subject to Section 66493, after the approval by the city of a final map of a subdivision or a parcel map, the city clerk shall transmit the map to the county recorder.

(b) If a final map or parcel map is subject to Section 66493, after all certificates or statements and security required under Section 66493 have been filed and deposited with the clerk of the board of supervisors and approved by the county, the clerk of the board of supervisors shall certify or state that the certificates and statements have been filed and deposits have been made and shall transmit the final map or parcel map to the county recorder.

(c) After the approval by the county of a final or parcel map of a subdivision within unincorporated territory, the map shall be transmitted ultimately to the county recorder.

Government Code §66466: Acceptance or rejection by county recorder; fee; storage; index

(a) The county recorder shall have not more than 10 days within which to examine a final or parcel map and either accept or reject it for filing.

(b) If the county recorder rejects a final or parcel map for filing, the county recorder shall, within 10 days thereafter, mail notice to the subdivider and the city engineer if the map is

within a city, or the county surveyor if the map is within the unincorporated area, that the map has been rejected for filing, giving the reasons therefor, and that the map is being returned to the city clerk if the map is within a city, or to the clerk of the board if the map is within the unincorporated area, for action by the legislative body. Upon receipt of the map, the clerk shall place the map on the agenda of the next regular meeting of the legislative body and the legislative body shall, within 15 days thereafter, rescind its approval of the map and return the map to the subdivider unless the subdivider presents evidence that the basis for the rejection by the county recorder has been removed. The subdivider may consent to a continuance of the matter; however, the prior approval of the legislative body shall be deemed rescinded during any period of continuance. If a map is returned to the county recorder, the county recorder shall have a new 10-day period to examine the map and either accept or reject it for filing.

(c) If the county recorder accepts the map for filing, the acceptance shall be certified on the face thereof. The map shall be securely fastened in a book of subdivision maps, in a book of parcel maps, or in a book of cities and towns which shall be kept for that purpose, or in any other manner as will assure that the maps will be kept together. The map shall become a part of the official records of the county recorder upon its acceptance by the county recorder for filing.

(d) The fee for filing and indexing the map is as prescribed in Section 27372 of the Government Code.

(e) The original map shall be stored for safekeeping in a reproducible condition. The county recorder may maintain for public reference a set of counter maps that are prints of the original maps and produce the original maps for comparison upon demand.

(f) Upon the filing of any map, including amended maps and certificates of correction for recordation pursuant to this section or any record of survey pursuant to the Professional Land Surveyors' Act (Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code), the surveyor or engineer who prepared the document shall transmit a copy of the document, including all recording information, to the county surveyor, who shall maintain an index, by geographic location, of the documents. The county surveyor may charge a fee not to exceed the fee charged for recording the document, for purposes of financing the costs of maintaining the index of the documents.

The requirements of this subdivision shall not apply to any county which requires a document filed pursuant to this section to be transmitted to the county surveyor and requires that official to maintain an index of those documents.

Government Code §66474:

The text of this provision appears in Petitioners' Appendix, Volume II, pages 9-10.

Government Code §66474.1:

The text of this provision appears in Petitioners' Appendix, Volume II, page 10.

Government Code §66499.37:

The text of this provision appears in Petitioners' Appendix, Volume II, page 11.

Vehicle Code §21:

The text of this provision appears in Petitioners' Appendix, Volume II, page 11.